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SUPREME COURT
STATE OF WASHINGTON

QUALCOMM INCORPORATED,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF AMICI CURIAE
WASHINGTON TRUCKING ASSOCIATIONS AND
AMERICAN TRUCKING ASSOCIATIONS, INC.

Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661
Attorneys for Amici Curiae
Washington Trucking Associations and
American Trucking Associations, Inc.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. IDENTITIES AND INTERESTS OF AMICI CURIAE	1
B. INTRODUCTION	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	5
E. CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
 <u>Washington Cases</u>	
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846, cert. denied, 552 U.S. 1040 (2007).....	4
<i>Community Telecable of Seattle, Inc. v. City of Seattle</i> , 164 Wn.2d 35, 186 P.3d 1032 (2008).....	9
<i>Qualcomm, Inc. v. Dep't of Revenue</i> , 151 Wn. App. 892, 213 P.3d 948 (2009).....	6, 7, 10
<i>Western Telepage, Inc. v. City of Tacoma</i> , 140 Wn.2d 599, 998 P.2d 884 (2000).....	10
 <u>Statutes</u>	
Laws of 2007, ch. 6 § 1002(8)	6
RCW 82.04.065(2).....	2
RCW 82.04.065(27).....	6, 10
RCW 82.04.065(27)(a)	10
RCW 82.043.065(2).....	11
RCW 82.047.065(2) (2000)	2, 5
 <u>Other Authorities</u>	
http://www.peoplenetonline.com	6
http://www.xata.com	6
http://www.wisegeek.com/what-is-a-data-bus.htm	3

A. IDENTITIES AND INTERESTS OF AMICI CURIAE

Amici Washington Trucking Associations (“WTA”) and American Trucking Associations, Inc. (“ATA”) have articulated both their identities and interests in this case in their motion for leave to file a joint amici curiae brief. Notably, a significant number of their members utilize truck tracking systems like the one at issue in this case.

B. INTRODUCTION

This case involves retail sales taxes imposed on Qualcomm, Incorporated (“Qualcomm”) for sales of its OmniTRACS System (“System”). The System is customarily purchased and employed by commercial trucking carriers, particularly interstate trucking carriers, to monitor truck driver performance, engine information, and other trucking activities to improve operational efficiency. The Service component of the System principally provides data processing and information services to WTA and ATA members. Qualcomm paid business and occupation taxes on the System because it considered the System an information service rather than a “network telephone service” subject to retail sales tax.

The Department of Revenue (“Department”) audited Qualcomm and determined the primary purpose of the System was data transmission rather than data processing. Accordingly, the Department concluded the

formerly defined in RCW 82.04.065(2) (2000). Qualcomm paid the taxes due and filed a superior court action seeking a refund. The trial court granted the Department's summary judgment motion and Qualcomm appealed. The Court of Appeals affirmed.

The Court of Appeals' opinion betrays a fundamental misunderstanding of the uses to which the trucking industry puts services like the System. WTA and ATA members are not buying a telecommunications system when they purchase Qualcomm's System or another system like it. Instead, the trucking carriers are buying a vital truck and driver management tool that utilizes processed data or information to enable them to supervise their drivers and to ensure efficient deliveries.

This Court should reverse the Court of Appeals where that court's interpretation of former RCW 82.04.065(2) is predicated upon an erroneous factual assumption.

C. STATEMENT OF THE CASE

WTA and ATA acknowledge the statements of the case in the parties' opening briefs. They supplement those statements as follows:

Both Qualcomm and the Department speak to a customer's reasons for purchasing the System. But it is WTA and ATA who are in the best position to speak for Qualcomm's trucking carrier customers. The major

reason WTA and ATA members purchase and employ a system like Qualcomm's System is to secure reliable information about the operation of long haul trucks on the road. Unlike most employers who can supervise employees working at a fixed location, trucking carriers cannot observe and supervise their drivers because the drivers haul over long distances and are away from the carriers' principal physical locations. Supervisors cannot observe the drivers while they are on the road.

Qualcomm is one of three primary competitors marketing a fleet management system that tracks critical information concerning a carrier's fleet. XATA and PeopleNet market similar systems. All three provide their customers with the same basic truck and driver operational information, which is taken from a data bus¹ located on each truck. The companies' respective fleet management systems capture and manipulate data relating to, among other things, engine and driver performance for WTA and ATA members. This information is then sent via satellite or other communications mode to trucking carriers, who typically use it to reduce operating costs, increase safety, and improve customer service.

¹ A data bus is a computer subsystem that allows for the transferring of data from one component to another on a motherboard or system board, or between two computers. This can include transferring data to and from the memory, or from the CPU, the central processing unit, to other components. See <http://www.wisegeek.com/what-is-a-data-bus.htm> (last visited August 10, 2010).

These fleet management systems offer vital management tools to WTA and ATA members that allow them to discover inefficiencies and better manage their operating costs. For example, WTA and ATA members generally want to discourage drivers from taking circuitous routes to pad their compensation and from making an excessive number of stops or lingering too long at rest stops or truck stops.² Use of Qualcomm's System ensures that drivers take the most direct and efficient routes to deliver goods and that they do not stop at particular sites for extended periods of time. Members utilizing the System and systems like it know where their tractors and trailers are located and in many instances can use the information to assist in monitoring a particular driver's hours of service.³ These systems also allow a carrier's customers to verify where their shipments are at any given time. For example, Qualcomm's System can receive and process data that allows it to estimate a particular shipment's expected arrival time.

² Compensation for long haul truck drivers is usually paid on a cents-per-mile driven basis, rather than on an hourly basis precisely because paying long haul drivers on an hourly basis would offer incentives to circuitous routes and other delays. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007) (addressing regulation converting other forms of compensation like cents per mile into hourly wages for purposes of Washington's overtime wage statute).

³ This information improves management planning related to a driver's ability to complete a delivery in his remaining driving hours or to reach a shipper's location for cargo pickup by a prescribed time. A significant value of the System is its use as a tool for efficiently managing local assignments.

The various fleet management systems also assist WTA and ATA members' effort to ensure that their fleets run safely. In its more extended version, Qualcomm's System conveys vital information about tractor fuel consumption and intake, the speed at which the driver is driving (to avoid traffic tickets and convey information about driver safety and reliability), and the time a driver is idling. For example, a trucking carrier can learn of trailer connects/disconnects, temperature updates on refrigerated cargo, mileage travelled, RPM and MPH data, and any hard braking by the driver. A carrier can also determine what went on in the seconds before an accident. All of this information is derived from data processed through the Service component of the System.

D. ARGUMENT

According to the Court of Appeals, Qualcomm's System provides "network telephone service" as defined by former RCW 82.047.065(2) (2000).⁴ In reaching this conclusion, the Court of Appeals improperly

⁴ That statute defined "network telephone service" as:

the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, *or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, or microwave or similar communication or transmission system.*

(emphasis added).

isolated and then separately analyzed the System's transmission and processing components. In doing so, the court overlooked the primary purpose behind a trucking carrier's purchase of a management service like the System. This mistake detrimentally shaped the court's analysis of this case and requires reversal by this Court.

The first flaw in the Court of Appeals' analysis is that the transmission and processing components of the System are purchased as part of and wholly integrated with the System, which is indisputably an information service. CP 78, 81-84.⁵ None of the System's components function independently of one another. CP 30, 76-77. Customers purchase the entire System through a single contract. CP 184-90.

In focusing almost exclusively on the transmission component of the System, the Court of Appeals overlooked the System's true purpose and its more extensive functionalities. Yet that purpose and those functionalities are the main reasons trucking carrier customers purchase systems like Qualcomm's.

In 2007, the Legislature amended the statute and replaced the phrase "network telephone service" with "telecommunications service." Laws of 2007, ch. 6 § 1002(8). The change updated terminology, but did not alter the scope of the statute. *Qualcomm, Inc. v. Dep't of Revenue*, 151 Wn. App. 892, 898, 213 P.3d 948 (2009). "Telecommunications service" is now defined as "the electronic *transmission, conveyance, or routing* of voice, data, audio, video, or any other information or signals to a point, or between or among points." RCW 82.04.065(27) (emphasis added). Thus, telecommunications services are limited to *transmission* services.

⁵ This is also true for the XATA and PeopleNet systems referenced above. See <http://www.peoplenetonline.com>; <http://www.xata.com> (last visited August 10, 2010).

The primary purpose of these systems is to generate and manipulate data to determine the location and load status of customer vehicles. This is accomplished without the need for person-to-person communication. This is a key component of what trucking customers purchase. Although Qualcomm's System can transmit information via text or macro message, that ability does not automatically transform it into a taxable telecommunications service. Its vehicle tracking function operates automatically and independently of any message that might be sent by or to a driver. The Court of Appeals' and the Department's mischaracterizations of the System as a telecommunications service is belied by the fact that the System does not serve as a replacement for a driver's cell phone. It is not a means for free-flowing conversations between a carrier and its drivers.

Use of the System requires a device to be installed in the carriers' trucks. This device communicates information to Qualcomm's Network Management Center ("NMC"). The NMC collects and translates the raw data received from the device using Qualcomm proprietary algorithms. The data is converted into location, time, and date information readable by the System software at the trucking carrier customers' dispatch centers.⁶

⁶ The Court of Appeals acknowledged the System involved "*some processing of data*" related to the production of position poll reports. *Qualcomm*, 151 Wn. App. at 902 (emphasis added).

A large portion of that information is required by the Federal Motor Carriers Safety Act.

Systems like Qualcomm's capture a variety of engine and other performance data from customer vehicles, which WTA and ATA members can use to monitor driver behavior and vehicle condition for safety enhancement purposes. Such systems also provide routing and mileage information that can later be used for highway tax compliance and other purposes. Information received and processed from the engine monitoring systems, including gear shifting, hard braking, and fuel consumption may be particularly useful in monitoring and adjusting driver behavior. Simply having reliable evidence of a truck's actual position at specific times can be useful in defending against mistaken allegations that the truck caused an accident or incident at another location at that same time. Contrary to the Department's assertions, these expansive functionalities are what induce trucking carriers to purchase such systems.

The Department's assertion that customers primarily purchased the System "to transmit information between their own equipment and software" vastly oversimplifies the purpose of systems like Qualcomm's. Dep't Suppl. Br. at 1. Trucking carriers are not buying a mere "data transmission" service; instead, they are buying a vital management tool

that utilizes processed data or information to enhance their operational efficiency.

The Department's additional assertion that the System's principal focus is text and free form messaging betrays a fundamental misunderstanding of the trucking industry's need for and use of a system like Qualcomm's System. *See id.* at 3-4, 7. Trucking carriers do not need an expansive system like Qualcomm's for voice or simple text messaging. Messaging within the industry is easily handled with other forms of communication like CB radios or cell phones with texting capabilities. Trucking carriers would not need a system like Qualcomm's System if messaging was the only capability they required.

The bottom line is that WTA and ATA members are not purchasing a mere telecommunications system when they purchase the System or one similar to it. Instead, they are buying a management tool that provides processed data and information to ensure operational efficiency and safety.

The second major flaw in the Court of Appeals' analysis is that it conflicts with this Court's decision in *Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008). Merely because telephonic-like facilities are employed to provide a service does not render the service taxable as telephonic or data transmission services.

This fact renders the Court's decision in *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 998 P.2d 884 (2000) distinguishable. There, the paging system at issue was merely a communication system highly analogous to a traditional phone service. *Id.* at 602, 609-11. But here, Qualcomm's System is not like Western Telepage's more traditional service. *Qualcomm*, 151 Wn. App. at 901-02.

RCW 82.04.065(27)⁷ specifically defines taxable telecommunications services not to include services that involve data processing and information services where the purchaser's primary purpose is the processed data or information. As noted *supra*, WTA and ATA members do not purchase systems like Qualcomm's for a telecommunications purpose. Instead, they purchase them for their data processing function, which is vital to the carriers' operational efficiency.

E. CONCLUSION

Fleet management systems help trucking carriers improve productivity, reduce operating costs, and increase security. The Court of

⁷ Under RCW 82.04.065(27)(a), "telecommunications service" does not include:

Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser *where such purchaser's primary purpose for the underlying transaction is the processed data or information.*

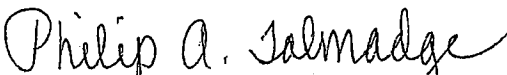
(emphasis added).

Appeals made an erroneous assumption about the reasons behind a trucking carrier's purchase of Qualcomm's System or systems similar to it. It also mistakenly concluded the true object of such systems is to transmit information rather than to collect and process vital operational information. The transmission component of such systems is incidental to the processing and information services component. Accordingly, Qualcomm should not be taxed for providing "network telephone service" as formerly defined in RCW 82.043.065(2).

This Court should reverse the Court of Appeals' opinion and remand to the trial court for further proceedings.

DATED this 20th day of August, 2010.

Respectfully submitted,


Philip A. Talmadge, WSBA #6973
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661
Attorneys for Amici Curiae
Washington Trucking Associations and
American Trucking Associations, Inc.

DECLARATION OF SERVICE

On said day below I emailed and mailed by U.S. Mail a true and accurate copy of the following document: Motion of Washington Trucking Associations and American Trucking Associations, Inc. for Leave to File a Joint Amicus Curiae Memorandum and Brief of Amicus Curiae Washington Trucking Associations and American Trucking Associations, Inc. in Supreme Court Cause No. 83673-6 to the following:

Michele Radosevich
Davis Wright Tremaine LLP
1201 3rd Avenue, Suite 2200
Seattle, WA 98101

Robert McKenna
Attorney General's Office
PO Box 40100
Olympia, WA 98504

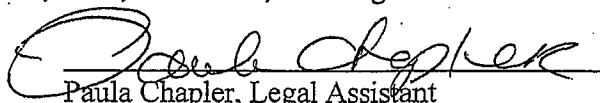
Brett Durbin
Attorney General's Office—Revenue Div.
PO Box 40123
Olympia, WA 98504-0123

Original efiled with:

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Clerk's Office
415 12th Street W
Olympia, WA 98504

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 20, 2010, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

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Subject: Qualcomm v. State of Washington

Per Mr. Talmadge's request, please see the attached for filing in the following case:

Case Name: Qualcomm Inc. v. State of Washington
Cause No. 83673-6
Attorney: Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick